(1) 4

Supreme Court, U.S.
FILED

No. 97 1377 NOV 12 1998

OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term, 1997

Guardianship and Conservatorship
of the Person and Estate of
Alicia A. Waters
a Severely Mentally and physically Disabled Person

Charles E. Waters and Florence E. Waters,
Petitioners,

v.

PIERRE B. FRAZIER,
Respondent,

Petition For a Writ of Certiorari to The United States Court of Appeals

---

PETITION FOR WRIT OF CERTIORARI

Charles E. Waters and F. Elaine Waters
1894 Cabernet Drive
Chula Vista, CA 91913
(619) 421-7684
Conservators of the Person of
Alicia A. Waters
Petitioners in Pro-Se

45 pp

QUESTIONS PRESENTED FOR REVIEW

1. To unify divergent holdings of the Courts of Appeal Resulting from the Fourth Appellate District's opinion affirming a probate court's decision not to accord res judicata effect to interim orders setteling accountings of Guardingship/Conservatorship Estates under Probate Code section 2103 despite the absence of any findings that the orders were obtained by fraud, conspircy or misrepresentation of any material fact.

2. To settle the question of whether the substantive due process rights of the families of the state of California are threatened by a State policy mandating the application of the doctrine of implied findings to support the affirmance of probate court orders denying petitions by parents to be appointed conservators of the Estates of their disabled children, thereby authorizing government intrusions into fundamental privacy interest of family autonomy while obviating its burden of proving that its orders are both necessary and narrowly tailored to achieve a compelling state interest.

PARTIES TO THE PROCEEDINGS

This case arises from a judgement of the Fourth Appellate District, Division One of San Diego California which affirmed the judgement of the Superior Court of the County of San Diego. Respondents, as identified in the caption, are not the only parties to the proceeding.

A list of parties not listed in the caption to the proceeding in the court whose judgement is the subject of this petition is as follows:

Judith Abeles, Esq., SBN 85860
P.O. Box 16612
San Diego, California 92176
Phone (619) 284-0061
(Attorney for the conservatee)

Judith Klein, Esq., SBN 143518
5638 Lake Murray Blvd, Suite 208
La Mesa, California 91942
Phone (619) 698-1882
(Attorney for the conservatee's Attorney)

Julie A. Jones, Esq., SBN 120591
Mulvany, Kahan & Barry
401 West A Street, 17th Floor
San Diego, California 92101-7994
Phone (619) 238-0101
(Attorney for the conservator)

Paula Rotenberg, Esq., SBN 108976
Mulvany, Kahan & Barry
401 West A Street, 17th Floor
San Diego, California 92101-7994
Phone (619) 238-0101
(Attorney for the conservator's Attorney)

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS..... ii

TABLE OF AUTHORITIES iii

OPINIONS AND ORDERS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 9

I. As applied to Petitioners, the taking of property violate the due process clause of the Fifth Amendment 9

II. As applied to Petitioners, the taking of property violate the taking clause of the Fifth Amendment 10

CONCLUSION 10

TABLE OF AUTHORITIES

Cases *Page(s)*

In Re Harvey's Estate (1970)
3 Cal. 3d 646, 91 Cal. Rptr. 510, 477 P.2d 742 ..... *5-7*

McLellan vs. McLellan (1941)
17 Cal. 2d 552, 110 P.2d 1034 ..... *5*

Pierce vs. Society of Sisters
268 U.S. 510 (1925) *8*

Shelley vs. Kraemer
334 U.S. 1 (1948) *8*

Statutes
Code of Civil Procedures section 1908 ..... *7*
Probate Code section 2103 ..... *4,5,7*

Other Authorities
U.S. Constitution, 14 Amendment *10*

OPINIONS AND ORDERS BELOW

The opinion of the Fourth Appellate District, Division One, dated May 27, 1997, is unreported and is set forth in Appendix A pages 1-38 and is unpublished. The denial of review by the California Supreme Court dated August 13, 1997, is set forth in Appendix C page 1.

STATEMENT OF JURISDICTION

The opinion of the Fourth Appellate District, Division one was entered on May 27, 1997. The denial of review by the California Supreme Court was entered on August 13, 1997. The jurisdiction of this court rest on 28 U.S.C.A. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states:

No person shall . . . be *deprived of* life, liberty, or *property, without due process of law.*

The Fourteenth Amendment of the United States Constitution states:

It is forbids the making or enforcement by any state of any law abridging the privileges and immunities of citizens of the United States; and secures all "persons" against any state action which results in either *deprivation of* life, liberty, "or *property" without due process of law.*

STATEMENT OF THE CASE

Charles E. Waters and his wife, Florence Elaine Waters [hereafter referred to as the Waters] petitioned the Superior Court of the State of California, for the County of San Diego to be appointed as conservators of the estate of their severely permanently brain damaged daughter, Alicia A. Waters [hereafter referred to as Alicia] upon the termination of the guardianship when Alicia attained majority. The petition was denied based on the trial court's unsupported findings that the Waters mismanaged the assets of the guardianship estate. Acknowledging that the Waters had provided excellent and loving care to their daughter as guardians of both Alicia's person and estate during the ten year guardianship, the probate court appointed the Waters as conservators of Alicia's person, but appointed a third person, Claudia Powell, a stranger, as conservator of Alicia's estate.

In lieu of imposing a statutory surcharge, and as alternative remedy for the alleged mismanagement of estate assets, the trial court compelled the Waters to execute a non-interest bearing promissory note in the amount of $150,000.00 to be secured by a second deed of trust on their residence.

Pierre B. Frazier, the court appointed temporary conservator of Alicia's estate, along with separate counsel for the Waters and Alicia, attended an unreported conference held in Judge Thomas R. Mitchell's chambers on August 9, 1995 to resolve problems with the Fifth Accounting. Frazier recommended that $55,391.00 in disbursements claimed by the Waters during the Fifth Accounting period be disallowed. Judith Abeles, the court appointed attorney for Alicia, recommended that $161,191.75 in disbursements claimed by the Waters during the Fifth Accounting period be disallowed.

The trial court arrived at the figure of $150,000.00 by compromising between the two recommended amounts and thereby necessarily disallowed $67,422.63 in disbursements claimed by the Waters during the Fifth Accounting period

without according the Waters the benefit of an evidentiary hearing.

The trial court's tentative ruling of August 9, 1995, ripened into the September 20, 1995 final order. 1.) denying the Waters' petition to be appointed as conservators of their daughters estate; 2.) appointing Claudia Powell, a stranger, as conservator of Alicia's estate, and 3.) compelling the Waters to execute a non-interest bearing promissory note in the amount of $150,000.00 to be secured by a second deed of trust on thir residence. The Waters appealed the order.

Concluding that the Waters were not denied procedural due process and that all four interim orders approving the first four accountings were not res judicata, the Fourth Appellate District affirmed the trial court's order. The court of Appeal's opinion filed on May 27, 1997, is attached hereto as Appendix A, pages 1a-16a. The California Supreme Courts denial of the Petition for Review filed on August 13, 1997, is attached hereto as Appendix C, page 17a, and is the subject of this Petition for Writ of Certiorari.

RES JUDICATA EFFECT OF PROBATE CODE SECTION 2103

Simply stated, the public policy underlying the doctrines of res judicata [claim preclusion] and collateral estoppel [issue preclusion] is to promote judicial economy by assuring the absolute finality of judgements and final orders and thereby prevent relitigation of the same cause of action between the same parties or their privies. In this way the doctrines guard against inconsistent judgements and prevent a losing party [or privy] from harassing the prevailing party by continuing suits on the same matter.

A final order made under *Probate Code* section 2103 settling and allowing a guardian/conservator's account releases the guardian/conservator from all claims of the ward/conservatee and of any persons affected thereby based on any act or omission directly authorized, approved, or

confirmed in the order, so long as that order is not obtained by fraud, conspiracy or by misrepresentation as to any material fact. [*In re Harvey's Estate* (1970) 3 Cal. 3d 646, 91 Cal. Rptr. 510, 477 P.2d 742].

The Court of Appeal affirmed the trial court's order based in part upon the trial court's findings that the Waters expended $71,638.50 of the estate assets previously approved and allowed by the probate court to improve the family residence for the specific benefit of their daughter. On the ground that the prior interim orders which approved and allowed these expenditures did not direct how Alicia's interest in such real property was to be reflected, the Court of Appeal concluded that *even without a showing of "fraud, misrepresentation or omission of material fact,"* the Waters were not entitled to assert a res judicata bar in their fifth accounting. [Op. 26:6-27.7].

The doctrine of res judicata has two aspects: 1.) Merger and bar; and 2.) collateral estoppel. The order is accorded a res judicata effect, i.e., claim preclusion, as to matters "necessarily adjudicated" and a collateral estoppel effect, i.e., issue preclusion, as to matters "actually litigated." There is a difference between the two concepts and when they are applied. Not all matters "necessarily adjudicated" for purposes of res judicata are "actually litigated" for the purposes of collateral estoppel.

Res judicata will apply only if the first action ended in a final judgement or final order *on the merits.* A judgement or final order rendered after the parties have been afforded *an opportunity to litigate the merits* is a judgement on the merits. The probate court is charged with the duty of scrutinizing the accounts and determining *all* issues raised by a petition for settlement. This duty requires the court not only to approve each account's mathematical accuracy, but also to decide *all underlying issues,* including whether the estate has been mismanaged. [*McLellan vs. McLellan* (1941) 17 Cal. 2d 552, 110 P.2d 1034] The purpose of periodic accountings is to allow the court to examine the record of the estate's

administration and to afford the court the opportunity to *pass on* the propriety and reasonableness of the managemant, [i.e., receipts, claims and disbursements, ect.] of the estate's assets. An order setteling and allowing an account [whether interim or final] operates in rem. After it becomes final, the order is *conclusive* res judicata against all persons interested in the estate *as to all matters embraced by the order.*

The Court of Appeal cites the probate Court's failure to pass on the issue of Alicia's interest in the real property as the basis for denying the res judicata effect of such interim orders. The issue is whether the matter in which title to the real property was vested was a matter that was embraced by the previous interim orders.

Generally, under *Code of Civil Procedures* section 1908, the effect of a final order in a special proceeding before a state court having jurisdiction to pronounce the order against a specific thing is conclusive upon its title. When the probate court approved and allowed the previous four accountings, it had before it all of the information concerning the ownership of the real property and estate assets used to improve the real property. By approving and allowing such expenditures, the probate court necessarily adjudicated the propriety and reasonableness of the Waters' management of the estate assets and, as a matter embraced by such orders, the manner in which title to the real property was held was passed upon, if not actually litigated. In the absence of fraud, conspiracy, or misrepresentation of material fact, these circumstances are sufficient to trigger the res judicata bar of *Probate Code* section 2103.

The trial court's order compelling the Waters to execute a $150,000.00 promissory note which is secured by a deed of trust on their residence, and payable upon demand to the conservator of the estate. To the extent that the Court of Appeal's affirmance of this order is based on the conclusion that the Waters are not entitled to assert a res judicate bar as to probate court orders approving such expenditures of estate assets, United States Supreme Court of Appeals is required

to unify the resulting divergence in the holdings of the appellate courts which have until now accorded a res judicata effect to such interim orders. [*In re Harvey's Estate* (1970) 3 Cal. 3d 646, 91 Cal. Rptr. 510, 477 P.2d 742].

DOCTRINE OF IMPLIED FINDINGS VIOLATES SUBSTANTATIVE DUE PROCESS

The United States Supreme Court recognized the right of parents to direct the upbringing of children under their control as a fundamental privacy interest in maintaining family autonomy. [*Pierce v. Society of Sisters*, U.S. 510 (1925)] As such, any governmental impingement of such an interest will be subject to strict constitutional scrutiny. Under the strict scrutiny test, the state policy compelling the Court of Appeal to apply the doctrine of implied findings to affirm a court order which impinges a fundamental interest must be shown by the government to be necessary and narrowly-tailored to achieve a compelling governmental interest.

The Waters recognize that the government's interest in the identification and correction of the mismanagement of estate assets by fiduciaries is compelling. Judicial action by state courts has been held to be state action sufficient to invoke constitutional scrutiny. [*Shelley v. Kraemer*, 334 U.S. 1 (1948) Thus, the action by the Court of Appeal in applying the doctrine of implied findings in this case and the denial of the California Supreme Court to review the case constitutes federal action.

Under the strict scrutiny test, the burden is on the government to prove that the means employed to achieve its objective are necessary and narrowly-tailored. In the absence of an evidentiary hearing, the necessity of the trial court's order could not be ascertained. Notwithstanding the Court of Appeal's opinion to the contrary [Op. 30:6-9], the burden was on the government to provide the Waters with an evidentiary hearing, even if required to do so sua sponte.

Further, the application of the doctrine of implied findings [i.e., the *presumption* that the trial court performed correctly in the face of a silent record] should not be applied in a case subject to strict scrutiny because such a presumption could in no way ensure that the probate court has methodically gone through each specific item and objection to that item in an account before it on a guardianship or conservatorship estate before allowing or disallowing a particular item, and thereby meet the narrowly-tailored requirement of the strict scrutiny test applicable here.

Consequently, the Court of Appeal's application of the doctrine of implied findings to affirm an order which impinges a fundamental privacy interest will not meet the narrowly-tailored element of strict scrutiny, and thus raises an important question of law necessitating Supreme Court of the United States to determine whether the applicability of the doctrine of implied findings to such a case threatens the substantive due process rights of the families in the State of California in general, and violates the substantive due process rights of the Waters in particular.

REASONS FOR GRANTING THE PETITION

To unify divergent holdings of the Courts of Appeal as to according res judicata effect to *Probate Code section 2103* interm orders, coupled with the threat to the substantive due process rights of California Families imposed by the application of the doctrine of implied findings to affirm court orders which impinge fundamental privacy interest in family autonomy while obviating the government's burden of proving that such orders are necessary and narrowly tailored to achieve a compelling state interest necessitate United States Supreme Court review to secure uniformity of decision and to settle an important question of law.

CONCLUSION

The petition for Writ of Certiorari should be granted, to encourage families to care for disabled family members so as to reduce the financial burden on state funded facilities providing instititionalized care, it is respectfully requested that the United States Supreme Court grant this petition for Writ of Certiorari in order to secure uniformity of decision by determining on the merits whether the first four accountings that were previously approved by judges in the past of expenditures specifically for their daughters benefit are to be accorded a res judicata effect, and whether the Waters are entitled to an evidentiary hearing to determine the merits of the disallowance of each disputed disbursement of the Fifth Accounting before being subjected to a court order which impermissibly impinges their privacy interest in family autonomy in order to protect the substantive due process rights secured to them by the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

Charles E. Waters and F. Elaine Waters
1894 Cabernet Drive
Chula Vista, California 91913
(619) 421-7684
Conservators of the Person of
Alicia A. Waters
Petitioners in Pro-Se

January 29, 1997

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Guardianship/Conservatorship of the Person and Estate of ALICIA A. WATERS, an incompetent Person.	
CHARLES E. WATERS et al., Petitioners and Appellants,	D024562
V.	
PIERRE B. FRAZIER et al.,	Super.ct No.P135331
Objectors and Respondents.	Super.ct No.P162857
	No.P162857

APPEAL from an order of the Superior Court of San Diego county, Thomas R. Mitchell, Judge. Affirmed as modified; motion for sanctions denied.

This is an appeal from an order settling the guardian's fifth account.[1]

---

[1] The notice of appeal states it is from the orders entered on August 29, 1995 and August 31, 1995, respectively. The amended notice of appeal states the appeal is from the orders entered on July 20, 1995,

The appellants, Charles E. and Florence Elaine Waters (collectively the Waterses), are the parents, former guardians of the person and estate, and now conservators, of the person of their permanently brain-damaged daughter, Alicia A. Waters. The respondents, Pierre B. Frazier and Judith Abeles, are respectively the temporary conservator of Alicia's estate and Alicia's court-appointed attorney. The Waterses challenge the propriety of the probate court's September 20, 1995 order settling their fifth guardianship account, specifically contending: (1) the court had no authority to order them to execute a note secured by a deed of trust against their home because neither Alicia's attorney nor Frazier brought proceedings for adjudication of Alicia's claim to property owned by them which would provide them notice of such action; (2) prior court orders settling their expenditures for necessary and desired improvements to their home for the care of Alicia are res judicata because there was no misrepresentation in obtaining those orders; (3) they may not be summarily assessed for sums which Frazier merely required clarification; (4) it was

---

August 14, 1995, August 29, 1995 and September 19, 1995, respectively. The appellate briefing only refers to a challenged order entered September 20, 1995. We presume the reference to the September 19, 1995 order was merely a typographical error and consider that matter properly before us.

improper for the court to arbitrarily disallow disbursements they made during the fifth accounting period without an evidentiary hearing; and (5) it abused its discretion in awarding $9,660.00 in attorney fees to Alicia's counsel. Frazier request sanctions for a frivolous appeal.

With the exception of one point conceded by Frazier as not properly being included in the September 20, 1995 order, we affirm the order settling the fifth account. In so doing, we conclude that based on the unique set of circumstances presented in this guardianship/ conservatorship case, the orders settling the first four guardianship accounting periods are not res judicata as to the probate court's settling of the fifth account. We further find the Waterses were not denied due process regarding any of the matters included in the order, that the court had jurisdiction to order the Waterses to execute a note secured by a deed of trust against their home in lieu of a monetary surcharge which would jeopardize the conservatorship estate, that the compromised amounts of disallowed expenditures are supported by the record and the award of attorney fees was proper. The request for sanctions is denied.

FACTUAL AND PROCEDURAL SUMMARY

In April 1975, Alicia suffered permanent brain damage at the age of 10 months after being treated with chemotherapy agents by physicians at Children's Hospital and Health Center of

S[2]an Diego (Hospital). As a result, Alicia has became functionally and developmentally disabled with severe mental retardation and spastic quadriplegia, requiring special care for her numerous orthopedic disorders and recurring seizures.

In 1984, Hospital and Alicia's mother as her guardian ad litem entered into a settlement of a malpractice action which was confirmed by the court April 19, 1984, in an order approving petition to compromise minor's personal injury claim. Under the settlement, Alicia was paid $200,000 (after payment of attorney fees and cost), monthly payments of $2,500 to increase annually at 4 percent, payment of $50,000, $65,000, $75,000, respectively, on the 5th, 10th and 15th anniversary dates of the settlement, payment of $100,000 on each of the 20th and 25th anniversary dates, and payment of $100,000 every 10 years thereafter.

At the time of the court's approval, it sanctioned disbursement of $148,726.95 of the initial cash proceeds to the Waterses for "custodial services

---

As to other referenced orders, we note the August 29, 1995 order appointing a temporary conservator is not an appealable order (Prob. Code, S 2750, subd. (a) and there are no orders in the record before us that correspond to the other referenced dates.

All statutory references in this opinion are to the Probate Code unless otherwise specified.

rendered" in the preceding 105 months, out-of-pocket medical expenses, special supplies, "construction and rebuilding of an additional room to their home," interest paid on the financing of the additional room and installation of a spa.[2] In addition, the order approving the compromise provided that the remainder of the cash proceeds, together with the monthly annuity, would be deposited in an account for Alicia, that a general guardianship for the minor should promptly be created, and that upon appointment of the guardian all settlement funds and future annuity payments would be received by the guardian. On July 24, 1984, the Waterses were appointed as guardians of Alicia's person and estate.

During the first through fourth accounting periods, the principal guardianship estate monies were in blocked accounts, requiring prior court order for withdrawal of the funds. Two thousand dollars per month of those funds was automatically released to a checking account for Alicia's care and special maintenance, which included a monthly stipend of $1,130 to the Waterses for

---

[2] In their petition for compromise of Alicia's personal injury/medical malpractice claim, they described the necessity of adding a ground room floor at their two-story residence to accommodate her needs for care. They also had installed a "therapeutic" spa for the primary purpose of providing her therapy.

"[a]ttendant care-housekeeper, child care." The first three accounts were filed annually and the fourth was filed three years later. Alicia was not separately represented by counsel during the course of the proceedings relating to the first four accounts.

As pertinent to this appeal, in the first accounting the Waterses specifically sought approval of an additional $3,273.40 for payoff on the room addition for the benefit of Alicia and for reimbursement of $14,841 for the cost of building a swimming pool and spa at their new home they had purchased to better care for Alicia.[3] In settling the first account, the court approved the room payoff and pool/spa reimbursement, and also $14,617,35 in estate

---

In the Waterses' declarations filed with the first account, besides referring to the original minor's compromise and the court-appointed reimbursements for a room addition and spa, they stated they moved into a larger home to be better able to care for Alicia on one floor. Because there was no spa at the new home which could provide important water therapy, they had a pool and spa built to better accommodate Alicia's growing body which would eventually "be[come] a full grown adult, but with the same disabilities." it was stressed that the Waterses wished to care for Alicia at home rather than in an institution and that she was receiving excellent care through the devotion of her family.

expenditures for "attendant care/child care."

In the second accounting, the Waterses requested and received approval for reimbursement of $18,198 for a bathroom and bedroom addition to their new house, $1,126.18 for cost expended for permits, plans and miscellaneous expenses for the room, $14,125 for custodial care and nursing during the accounting period, $1,130 monthly withdrawal for the Waterses for their care of Alicia, plus reasonable sums as necessary for Alicia's care and nursing by others.[4] The court also authorized that Alicia's monthly annuity could be used for her ordinary expenses.

In the third accounting, the Waterses requested and had approved additional expenditures of $980 for tile and electrical work and $326.57 for carpet and linoleum for the additional room and bath authorized in the second account. The court again authorized the monthly withdrawals for the Waterses' care and nurturing of Alicia, the withdrawal of reasonable sums as necessary for her care and nursing by others, and the use of the estate annuity to be used for Alicia's ordinary expenses. The court also granted the

---

[4] The Waterses represented that the new room addition was necessary because the new house had all of the bed and bathroom facilities on the second floor and Alicia was then 12 years old and "growing" and too difficult to carry upstairs.

Waterses' request to account every three years, settling the next accounting for July 31, 1990.

The fourth accounting filed November 20, 1990, advised the court the Waterses had moved with Alicia to their present residence which "has wider doorways and larger rooms which result in much easier wheelchair access throughout the house for Alicia.
But for her requirements[,] the residence would not have been purchased." The Waterses requested reimbursement of $20,000 as "partial [payment] of the purchase of a more suitable residence for the minor," to increase their monthly stipend for Alicia's care to $1,430, reasonable sums as necessary for the minor's care and nursing by others, the unblocking of the guardianship bank accounts containing $45,330.47, and to schedule the next account to the court "as of June 30, 1992," shortly after Alicia attained the age of majority.

Despite the concerns regarding the fourth accounting by the probate examiner, whose notes indicate the Waterses were not accounting in adequate detail, especially with regard to disbursements for spa upkeep, the court, after hearing the matter, granted the Waterses' various request, including the unblocking of the guardianship estate bank accounts.

Alicia reached the age of 18 on June 13, 1992. On February 15, 1994, the probate court notified the Waterses that they were to file an account for the guardianship estate within 60 days as

they had failed to account on June 30, 1992. The Waterses filed the verified fifth account in propria persona on March 16, 1994. It showed "debits" of $241,456.36, disbursements of $235,942.20, and assets on hand of $5,514.16. A hearing was set on the matter for April 13, 1994.

The probate examiner's notes for that hearing revealed problems with the accounting and concern about excessive amounts being spent, i.e, $92,800 for respite care "without specific authority," and $16,676.23 in "payments on home mortgage," and recommended the case be "referred to [the Public Guardian] for protection of former minor" because the Waterses continue to spend funds without prior court authority and are depleting the estate. The probate court, in an effort to resolve the accounting problems, continued the matter six times to allow the Waterses to file an amendment to their fifth account. With the services of new counsel,[5] the Waterses filed such amendment November 3,

---

[5] Between the filing of their proper account and obtaining their new counsel, Marshall Scarr of Peterson & Price, on October 17, 1994, the Waterses had retained and dismissed one other attorney. Although Peterson & Price was named originally as a respondent on appeal, in their opening brief the Waterses abandoned any issues regarding the portion of the court's order challenging the attorney fees awarded that firm.

1994.

In the meantime, a companion conservatorship proceeding was initiated due to Alicia's attained majority. Judith Abeles was appointed September 26, 1994, to represent Alicia as the proposed conservatee. The record reflects numerous continued hearings in the companion cases regarding the fifth accounting, the closing of the guardianship case, the appointment of a new conservator for Alicia's estate and person, and the transfer of the guardianship estate to the conservatorship case. The record also includes the probate examiner's notes itemizing the problems and concerns regarding each subject hearing.

The November 1994 verified amendment of the fifth account showed assets on hand at the end of the fourth accounting period of $114,982.71, total receipts of $242,141.51, total disbursements of $261,184.02 and assets on hand at the end of the accounting period of $91,828.09. The probate examiner's notes continued to question numerous expenditures,[6] noted the account still did not balance and strongly suggested the attorney appointed for the proposed conservatee be appointed to represent Alicia, the ward, in the guardianship case. The matter was again continued several times to allow the

---

[6] For example, the questioned expenditures included the payment of $50 an hour to Mrs. Waters for massages, hair care "relaxer" once a month at $50, and $300 for a cellular phone.

Waterses" attorney to employ a paralegal service to help with the accounting for purposes of filing yet another amendment. Because of further complications due to missing bank statements and delays in obtaining duplicates, the waterses were granted more extensions to file their next amended accounting.

By the time of an ex parte April 25, 1995 hearing, the Waterses had engaged yet a third attorney, Maxwell Agha, to represent them in the companion cases. Attorney Abeles had been appointed to represent Alicia in the guardianship proceeding with authority to hire an investigator to help obtain the "underlying data" necessary to evaluate the pending fifth accounting. At that time the court ordered the Waterses to file their amended accounting by May 19, 1995.

At a May 24, 1995 hearing in the conservatorship case, the Waterses were appointed conservators of Alicia's person. As to the matter of who should be appointed conservator of Alicia's estate, the court expressed concern, stating, "the determination of whether there is money missing or not needs to be done as soon as possible. Just on my watch we're gone back and forth on this and [have gotten] a lot of promises which are not fulfilled."

An amended accounting filed by the Waterses in June 1995 was rejected by a probate examiner. At a June 21, 1995 hearing, the court agreed that the accounting matter has 'gone on outrageously long," and expressed that

its patience is "sorely tried." the matter was continued to June 29, 1995, to allow Alicia's counsel to contact a "culturally or ethnically or racially matched person to handle [Alicia's] matters and estate."

At the June 29, 1995 hearing, the court first met with all parties in chambers to discuss a variety of alternatives concerning Alicia's estate, including the fact that Frazier, a retired banker who met the Waterses' criteria, had indicated his willingness to serve as conservator of Alicia's estate. The court then went on the record, stating its concern started with the fact that:

> "[I]n the guardianship we really have had a lot of difficulty in getting an accurate accounting presented and one that conforms to our probate rules. And it is important to me in performing my responsibilities of overseeing Alicia's estate and protecting her interest that we know where we are on the accounting. The Waters[es] have quite properly and honorably assumed the responsibility of caring for Alicia for 18 or 19 years of her life. And that has been I'm sure a challenging undertaking. At the same time because of the personal injury settlement she has, there are substantial amounts of money flowing in monthly and should [be] flowing in periodically by way of lump sum principal payment. And I want to ensure that those are properly used and invested and cared for so that in the long term Alicia's interest

will be protected. . . [I] The guardianship is still in place in the sense that the accounting is set for hearing on July 12. [The Waterses] are still guardians for the purpose of winding up the guardianship which functionally has terminated because Alicia has attained her majority. So they will be carrying out that task with Mr. Agha's assistance. He assures me that the several defects that are noted to that accounting are things that can be corrected and put in place. So that hopefully we will have that accounting in the guardianship in order. Because some of Alicia's money has apparently been invested in the home, that needs to be sorted out by the conservator to determine just what has been invested and what hadn't [*sic*], and what should be the effect how Alicia's investment in the home should be memorialized and handled. And I think it's an interest of everybody to have an end person take that responsibility. It would be asking a lot of the Waterses to undertake to define their own obligation. And so what I propose to do is appoint Mr. Frazier as temporary conservator . . . [a]nd I want [him] to review the status of the . . .old guardianship estate which is to be the conservatorship estate to determine just where we are in terms of assets to determine what investments have been made into the Waters[es]' home and . . . to advise me and advise the parties of a long [range] plan for Alicia's

> estate. . . And we have to make sure that the monies that come in will not only care for Alicia in the short term but out to the end of her life and so I want Mr. Frazier with his banking experience to marshal the asset[s;] that is[,] ascertain what there is and where and how much and what income is being earned by the assets and to not only set up a plan for the payment of Alicia's current [expenses] but to give a recommendation for long range expenses."

The court reiterated it was appointing Frazier as temporary conservator of Alicia's estate, that he would have the assistance of an attorney and an accountant, and that he would submit a preliminary report to the court regarding the status of the guardianship estate before August 9, 1995. At that time, Frazier would propose an investment counselor to be hired to help set up a plan for the conservatorship estate. The court envisioned a six-month time period, up to about January 1996, in which to do a complete reevaluation of the estate for purposes of determining whether Frazier would stay on as permanent conservator of the estate, whether the Waterses could be reinstated, or whether another person would be placed in that fiduciary office.

On July 10, 1995, with the assistance of Agha, the Waterses filed an amended fifth accounting which provided a third verified version of an accounting, this one for the 50-month period from August 1, 1990 through September 30, 1994. On July 24, 1995, Alicia's counsel

filed lengthy objections to the amended accounting,[7] and the probate examiner's notes for a July 26, 1995 hearing on the matter additionally pointed out the account was defective, listing numerous problems.[8]

on July 26, 1995, the hearing regarding the fifth account was continued to August 9, 1995 to permit the surety on the Waterses' guardianship bond to review

---

[7] Abeles's objections included challenges to $21,867.50 for Alicia's room and board, to excessive claims for respite care, to medical expenses without sufficient explanation, to $250 a month van expenses and a $90 parking ticket included for van maintenance, to miscellaneous expenses for charitable donations and reimbursement to the Waterses "of $54,647.48 allegedly for respite care advances," to about $1,900 in explained cash withdrawals, to $12,649.23 for clothing and furniture, to undocumented cash payments for massages, and numerous other irregularities which amounted to over $150,000 disbursed without authorization over a period of four years.

[8] The examiner noted the amended accounting showed disbursements of $320,814.98 and did not include details or explanations for questionable expenditures such as those mentioned by Abeles and those made to department stores, for utilities, pool maintenance, and $82,912.33 in miscellaneous expenses.

the objections before the court considered any surcharge issues. Also on July 26, 1995, the attorney for the temporary conservator advised the court the Waterses were not being cooperative with providing Frazier information regarding the purchase of their current home and that only about 10 pages of documents and cancelled checks for 1 year had been turned over to him.

Before the continued hearing, the Waterses filed objections to the various surcharges proposed by Alicia's attorney and an amended schedule of disbursements for clothing and furniture, Frazier filed his preliminary report as temporary conservator regarding the status of Alicia's estate, and Alicia's counsel filed a response to the Waterses' objections and a separate response to Frazier's preliminary report.[9]

Frazier's report recommended that certain sums paid by the Waterses from the guardianship be disallowed,[10]

Apparently, Frazier's report was delivered to Alicia's counsel for review before it was filed with the court on August 7, 1995. Abele's response to both that report and the waterses' response to her objections on behalf of Alicia were dated August 6, 1995, but filed stamped by the court August 4, 1995.

Giving the Waterses the benefit of the doubt, Frazier recommended the following sums be disallowed by way of compromise: Housing expenses--$21,867.50,

opining:

> "Because of the lack of disclosure of detail in the accountings submitted by [the Waterses], the number of versions of the fifth account which have been filed with this Court, the failure of *any* of the accountings (including the latest version filed on July 10, 1995) to fully balance, and [the Waterses'] failure to cooperate with [me] in providing information, [I am] forced to conclude that the accountings submitted by [the Waterses] that the accountings submitted by [the Waterses'] are not completely accurate." (Original italics.)

In summary, Frazier recommended a compromised amount of $55,391 of the Waterses' claimed disbursements for Alicia's care be disallowed; that this amount be evidenced by a promissory note payable by the Waterses individually to the conservator of Alicia's estate, payable upon demand and secured by a second deed of trust on the Waterses' residence; and that an independent fiduciary serve as conservator of the estate "to avoid future conflicts of interest" between the waterses and the conservatorship estate.

Frazier advised the court he had

---

utilities/pool and spa upkeep--$1,710.58, massages--$2,550, van maintenance--$5,398.31, excessive respite care--$16,527.73, miscellaneous expenses--$4,132.75.

originally intended to work with the Waterses to resolve the estate difficulties, but that they continued to be uncooperative and had "in fact, told untruths to [his] counsel" regarding the existence of guardianship bank accounts and other important facts. To the best of his ability, Frazier reported the total investments by Alicia's estate in the Waterses' home was $71,638.50. He also noted that there was about $12,000 unaccounted for in the guardianship bank account for the receipt and use of the $65,000 lump sum received by the guardianship estate in May 1994. Frazier opined the Waterses would have to explain such difference when they prepared their supplemental accounting at the close of the final guardianship period.

Alicia's counsel's position was that a total of $161,191.75 (miscalculated as $171,191.75) in disbursements by the Waterses should be disallowed. In addition to the disallowances suggested by Frazier, counsel requested all funds supposedly advanced to the Waterses for Alicia's care be disallowed unless it was documented that the funds originated from their own personal accounts, that funds for respite care be disallowed because of duplication of caregivers' time, and that all miscellaneous expenses claimed be disallowed. Abeles also recommended that the Waterses' current residence should be "put into a trust giving [Alicia] sole remainder interest, and that a lien be placed upon the property such that if it is sold, the entire proceeds will go into [Alicia's] estate."

The minutes of the August 9, 1995 hearing reflect a lengthy nonreported chambers conference in which the court and counsel for all parties discussed various issues concerning the guardianship and conservatorship estates, including the fifth accounting and the objections and Frazier's preliminary report. The court tentatively ruled that:

> "*Alicia Waterses is entitled to a lien on property for which the court compromises the amount of $150,000. [¶]*Court directs all counsel to confer to see whether or not they can agree to a different amount from what the court has tentatively ruled upon. [¶]*The above tentative ruling of the court will become the order on *8-31-* 95 at *5.00 P.M.* unless prior to that time the Parties have stipulated to a different order." (Original italics.)

The court also approved Alicia's counsel's request for attorney fees in the amount of $9,660 and certain amounts for other attorney and paralegal fees requested for services rendered to the Waterses as guardians.[11] The court set an October 11, 1995 hearing date to further discuss, among other matters, Frazier's examination of additional

---

[11] On appeal, the Waterses specifically abandon any issues concerning the propriety of the attorney fees to Peterson & Price and to the paralegal fees.

losses to the conservatorship estate and his report on a budget for Alicia's lifetime custodial care.

On August 22, 1995, the Waterses filed a response to Frazier's preliminary report, complaining that for the most part Frazier and his attorney have wasted valuable time at the expense of the estate to research prior accountings that have already been approved. The Waterses justified all their expenditures based on their decision to care for their daughter, "diagnosed with Spastic Quadriplegia Secondary to Neuroblastoma, treated by Chemotherapy with Sequelae," rather than to put her in a facility, which they suggested would cost about $105,485 per year. They challenged the allegation $12,000 was missing and advised the court that there were four, not two, guardianship bank accounts in which Alicia's money is held.

As pertinent to this appeal, the probate court signed and filed on September 20, 1995, an order based upon its tentative ruling on August 9, approving in part and disapproving in part the amended fifth accounting for the guardianship estate and granting Abeles attorney fees based upon her oral motion at that hearing. The order specifically provided that:

> "1. . . . [¶] a. In lieu of a surcharge against them as Guardians of [Alicia's estate, the Waterses] shall execute in favor of [Alicia] a non-interest bearing promissory note in the amount of $150,000.00 secured by a deed of trust on the real

> property located at 1894 Cabernet Drive, Chula Vista, California, 91913. This note and deed of trust represent (1) amounts invested by [Alicia's estate] in real estate owned by [the Waterses] ($71,638.50); (2) disbursements made by [the Waterses] as Guardians of [Alicia's estate] during the accounting period of August 1, 1990 through September 30, 1994 which are disallowed by the Court; and (3) $10,938.87 unaccounted for between September 30, 1994 and July 18, 1995 in Great Western Account No. 160-501591-6. [¶] . . . [¶] 4. Upon the oral motion of Judith Abeles, Esq., Court-appointed counsel for [Alicia], for attorney's fees, [Frazier] as Conservator of [Alicia's estate] is authorized and directed to pay to Judith Abeles, Esq. the sum of $9,660.00."

The Waterses timely appealed from these portions of the September 20, 1995 order.[12]12

---

[12] The Waterses filed two notices of appeal. The first before the September 20, order was filed and the second, an amended notice, on September 28, 1995. As noted in footnote 1 (*ante*, at p. 1), we construed the appeal as timely and proper based on the amended notice. Specific portions of the September 20, 1995 order pertaining to the vesting of Alicia's title to a specially equipped van, the disposition of any proceeds from sale or

DISCUSSION

Before addressing the Waterses' specific objections to the probate court's order, we make several observations. The problems in this cas did not arise from the Waterses' condu in their capacity as guardians of Alicia's person, but rather in their fiduciary capacity as guardians of her estate. As the court below and parties acknowledged, the Waterses have taken extremely good personal care of their daughter Alicia during the course of h life and the guardianship, and it is assumed they will continue to provide such loving care in their new capacity conservators of her person.

Our review of the record reflects that the probate court, faced with settling and approving a problematic fifth accounting for the guardianship estate, with full awareness of the challenges for the Waterses in providi Alicia's care and of the substantial amounts of money that had flowed into estate and which would continue to do pursuant to the earlier personal injur settlement, strove to find an equitabl balance between permitting the Waterse

---

exchange of the van, the termination o the guardianship, the delivery of the guardianship assets and records to Frazier, the denial of reduction of th guardian's bond and the denial of the requested sealing of the guardianship records, like the earlier mentioned attorney and paralegal fees granted, a not challenged on this appeal.

BEST AVAILABLE COPY

to oversee and direct Alicia's care and protecting her estate to ensure that the funds were properly used and invested so that Alicia's long-term care would be covered. To such end, numerous extensions of time and efforts were made to accommodate the Waterses' attempts to put together the fifth accounting. When it became evident that they could not accurately account for large amounts of funds expended from Alicia's estate and that the estate's bank accounts were left with low balances compared to those in earlier accountings, the court appointed counsel for Alicia and a temporary conservator for her estate to further investigate the matter for her protection.

At the time of the hearing from which the challenged order emanated, the Waterses were still unable to provide sufficient information to explain the numerous questionable disbursements from the estate funds. Unfortunately, the Waterses were, and are, unable to compromise their belief that they should not be questioned about their expenditures because they have sacrificed their lives to care for Alicia at home rather than place her in an institution which would cost far more than what they have expended of her estate to care for her in such a loving manner. While the care the Waterses have provided for Alicia is commendable, the duties and responsibilities of a fiduciary with respect to a ward's/conservatee's estate are clear. A guardian or conservator is not to profit from the

ward's/conservatee's estate. (§§ 2401, 2401.3; *Guardianship of Wood* (1961) 193. Cal.App.2d 260.)

Hence, based on this record, we cannot say the probate court abused its discretion or acted in excess of its jurisdiction in compromising the vast discreprancies in the Waterses' fifth accounting by resolving the matter in such a fashion as to preserve both the family home and Alicia's estate's interest in that home in lieu of surcharging the Waterses, which would have in all likelihood caused the loss of that home.

I

Due Process

while acknowledging that a probate court has broad discretion to surcharge a guardian and determine all issues "'necessarily incidental'" to the presentation of an account (*Guardianship of Wood, supra*, 193 Cal.App.2d at p. 267), the Waterses assert the court here had no authority under the Probate Code to order them to execute a note secured by deed of trust against their home in the absence of either Alicia's attorney or the temporary conservator bringing specific proceedings for adjudication of a claim by Alicia to the property owned by them. In essence, the Waterses claim they were denied due process because the court did not comply with the procedural mandates of sections of the Probate Code which deal with such claims to interests in the real property of another (see, e.g., § 2520). Without such a proceeding, they argue they had no notice that the

court might trace Alicia's estate monies to their home and require them to forfeit an interest in their home to her estate without further process. We conclude the court acted within its jurisdiction and the Waterses were not denied due process.

As respondents correctly point out, the Waterses did not object to the procedures followed by the probate court in settling the fifth accounting. The specific Probate Code section dealing with claims to real property of others is not exclusive or mandatory, and the Waterses had more than adequate notice that the court might fashion some type of remedy for the discreprancies in the guardianship estate account which included an interest in their property.

When the probate court has before it, as it did here, the subject of settling an account in a guardianship or conservatorship estate, its authority includes the power to allow or disallow claims of expenses, to enforce orders regarding the estate assets and liabilities, to surcharge the guardian or conservator for intentional or negligent conduct which causes a loss to the estate, and "to determine 'all issues necessarily incident thereto.'" (*Guardianship of Woods, supra*, 193 Cal.App.2d 267; see *Conservatorship of Starr* (1989) 215 Cal.App.3d 1390, 1394-1395.) The court's power to enforce orders with respect to the settling of such accounting also necessarily implies the power to "take adjudicate the authority of the [guardian or] conservator to take specific actions

pursuant to all orders relating to the [guardianship or] conservatorship . . .that affect the account." (*Conservatorship of Starr, supra*, at p. 1395.) Thus, "[a]ny action that may result in property being included or excluded from the estate inventory clearly affect the [guardianship or] conservatorship accounts." (*Ibid.*) Further, "[t]he probate court is empowered to impose surcharges on guardians sufficient to compensate for all economic losses suffered by the guardianship estate as a consequence of a guardian's wrongdoing. [citations.]" (*Bank of America v. Superior Court* (1986) 181 Cal.App.3d 705, 719.)

While it is true that the probate court usually does not have jurisdiction to adjudicate the claim of a ward or conservatee to the property of a third party during the settlement of an account, such does not hold true when the claim to the property involves a party who is privity with the guardianship or conservatorship, such as the Waterses are in this case by virtue of their fiduciary relationship. (*Central Bank v. Superior Court* (1955) 45 Cal.2d 10, 16-18; *Guardianship of Vucinich* (1935) 3 Cal.2d 235, 243-245; *Conservatorship of Starr, supra*, 215 Cal.App.3d at pp. 1394-1395.)

After receiving notice February 15, 1994, that their fifth accounting, which was to be done June 30, 1992, was overdue, the Waterses were given numerous notices of the defects in their accounting and were specifically given notice that the court was concerned with

the monies from the fund used on various properties owned by the Waterses without showing any benefit to Alicia's estate. It was due to such concern that the court finally appointed counsel for Alicia, and Frazier, a temporary conservator, to review the guardianship accounts. Both Alicia's counsel and Frazier recommended in their responsive pleadings to the Waterses' various versions of the fifth accounting that a lien should be placed on the Waterses' home to compensate the estate for the numerous investments from it since its inception. The court had also at the time of Frazier's appointment ordered the Waterses to provide him any and all information on their current home so that he could trace any interest Alicia might have. Such references clearly put the Waterses on notice that the court might order some type of lien to evidence Alicia's estate's interest in their home.

Realizing the delicate balance of interests in this case and the fact that the Waterses were not neutral third-party guardians, but rather parents who were providing loving care to a severely functionally and mentally disabled child, the court fashioned a remedy for the guardian's inaccurate and unexplainable account of the estate monies since the fourth accounting period. Stopping short of surcharging the Waterses for $150,000 in cash, which would in all certainty have triggered an action against the surety on the bond and subsequently the loss of their home in which they provided care to Alicia, the court incorporated

the compromise suggestions of the temporary conservator and Alicia's counsel that would ensure protection to all parties for the benefit of Alicia's estate. As noted above, the court had the jurisdiction to do so and the Waterses had notice such might occur.

Thus, we conclude the record belies the Waterses' assertion they were denied due process regarding any interest in their real property during the course of the settlement of their fifth accounting. We further conclude the court had authority to order them to execute a promissory note secured by a deed of trust against their home in lieu of a surcharge for purposes of ensuring Alicia's estate interests in settling the discreprancies in the fifth guardianship account. (See also § 2401.3)

II

Res Judicata

Relying on section 2103, the Waterses also contend the portion of the September 20, 1995 order which recites $71,638.50 of the promissory note amount is based upon investments of Alicia's estate funds in real estate owned by them is invalid because such is premised upon the probate court's reassessment of the previously settled four accountings in the guardianship estate in violation of res judicata principles. We disagree.

Although section 2103 provides that orders approving intermediate, as well as final, accounts of a guardian or conservator are given res judicata effect as to those matters "directly authorized, approved, or confirmed in the . .

.order[s]" (§ 2103, subd. (a), those orders settling earlier accounts are not conclusive as to matters "which might have been passed upon but were not . . . ." (*Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 592.)

Moreover, section 2103, subdivision (b) provides its res judicata effect does not apply "where the . . . order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the . . . order as to any material fact." For purposes of analysis, the misrepresentation referred to in this subdivision "includes, but is not limited to, the omission of a material fact." (§ 2103, subd. (b).) The Waterses did not raise the issue of res judicata in the trial court.

Alicia was not represented by counsel during the course of the first four guardianship accounts. Nor did the accounts and orders settling them address the issue of Alicia's interest as a result of the investments by her estate funds in any of the improvements or additions to real property owned by the Waterses during the course of the guardianship. The earlier court orders that approved certain expenditures and reimbursements for real estate improvements by the Waterses and a down payment on their current home, did not direct how Alicia's interest in such real property was to be reflected. Thus, even without a showing of fraud, misrepresentation or omission of material fact, the res judicata bar of section 2103 does not preclude that portion of

the court's September 20, 1995 order directing the Waterses to execute a promissory note in Alicia's estate's favor based upon $71,638.50 of improvements to real property previously approved but from which the Waterses have profited. Such matter was simply not passed upon during the earlier accounts.

We believe section 2103, subdivision (b) is intended to protect potential objectors like Alicia who might be misled by a guardian's or conservator's misrepresentations or omissions "into waiving their opportunity to raise objections in the guardianship proceeding." (*Bank of America v. Superior Court; supra*, 181 Cal.App.3d at pp. 715-716.) We therefore conclude the Waterses are not entitled to assert a res judicata bar in the fifth accounting based on the approved expenditures to real property in the earlier accounts because the full extent of those transactions on Alicia's estate was not disclosed to the court. Had the full extent of those transactions been revealed concerning such investments, the court would have been aware that Alicia's interest and the benefits derived from her interests were not fully protected. In such event it is most likely the court would have appointed counsel to represent her.

We therefore conclude the Waterses have failed to show that the settling of the earlier guardianship estate accounts barred any portion of the probate court's September 20, 1995 order.

III

"Unaccounted for" Sums

the Waterses next contend, and Frazier concedes, the probate court erroneously included an amount of $10,938.87 for sums "unaccounted for between September 30, 1994 and July 18, 1995 in Great Western Account No. 160-501591-6" in the september 20, 1995 order. Although such amount may have been unaccountable at the time of the August 9, 1995 hearing, because it fell within another accounting period, it was not properly included within the fifth accounting then being settled by the court. Such amount must therefore be stricken from the court's order and the order modified accordingly.

IV

The Disallowed Expenditures

The Waterses further challenge as improper that portion of the probate court's order made in lieu of a surcharge for $67,422.63 of disallowances for disbursements made by them during the period of the fifth account. They assert that because the court did not identify the specific expenditures it disallowed and determined the matter of the total amount assessed without an evidentiary hearing, it arbitrarily decided the disallowed expenditures thereby abusing its discretion. Based on this particular record, we disagree.

Although the probate court has limited jurisdiction defined by statute and has no general equity jurisdiction, "it does have the power to apply equitable principles in aid of its functions as a probate court. [Citatons.]" (*Estate of Reade* (1948) 31

Cal.2d 669, 672.) It has thus long been held that in passing upon the propriety of expenditures in an account before the probate court, the court is "governed by equitable considerations relating to the law of trust. [Citations.]" (*Guardianship of Cookingham* (1955) 45 Cal.2d 367, 370.) The burden is upon the guardian or conservator to justify the items in his or her account. (*Guardianship of Vucinich, supra,* 3 Cal.2d at p. 241.) The burden is also on the guardian or conservator to affirmatively show the court erred in settling the amount of any disallowance of disbursements in an account. (*Denham v. Superior* Court (1970) 2 Cal.3d 557, 564.)

While in most cases the probate court will be able to go methodically through each specific item and objection to that item in an account before it on a guardianship or conservatorship estate before allowing or disallowing a particular item, this was not one of those cases where such was possible. The record shows the proceedings concerning the fifth accounting by the Waterses, which they had to be ordered to prepare in the first instance, drug on for over a period of 17 months. During that time, the Waterses had filed three different accounts for the period since the fourth accounting and had been advised by the probate examiners and court of numerous discreprancies in the accounts. The Waterses had employed three different attorneys, and had generally failed to cooperate with Frazier, his attorney or Alicia's court-appointed attorney in

submitting an accurate fifth accounting.

In an attempt to rectify the matter, the court finally required the filing of a preliminary report of the guardianship/conservatorship estate by a neutral temporary conservator. The court also appointed an attorney for Alicia to submit objections and recommendations on both the preliminary report and the Waterses' amended fifth accounting. The court allowed the Waterses to respond to the conservator's report, to Alicia's attorney's objections and to file any other data which could explain or justify their fifth accounting. In these regards, the court held numerous hearings and set August 9, 1995, as the date to resolve the fifth accounting which had gone on for so long. After making its tentative ruling in which it stated the lien on the Waterses' property was a compromise amount, the court gave the parties until August 31, 1995, to arrive at a different amount for the lien or to stipulate to some other resolution.

The record is silent as to the discussions before the court at the time of the August 9, hearing. Nor does it reflect any objections by the Waterses to the court's tentative ruling or show they suggested a different amount for the lien or that they proposed a different resolution, other than to maintain that all their expenditures should be approved. Nothing in the record suggests the Waterses requested a further continuance of the matter or asked for an evidentiary hearing or requested that the August 9 hearing be reported. Thus, under

the circumstances presented by this record, we simply cannot say the probate court abused its discretion in compromising the amounts of disallowances for purposes of establishing an amount for the lien without specifically identifying each item.

Although, as noted above, more specificity is preferable for purposes of review, the lack of such is not fatal. Because general principles of appellate review apply equally to appeals in probate proceedings, the issues the Waterses failed to raise below may not be raised for the first time here. (*Estate of Cooper* (1970) 11 Cal.App.3d 1114, 1123.) Hence, they may not complain at this time to the lack of specificity or to the fact the court did not conduct a full evidentiary hearing on the objections to their fifth accounting since one is not required by statute. (See §§ 1046, 11002.)

Moreover, the Waterses were given more than sufficient time to fulfill their duties as fiduciaries to supply the required proof or explanations for the items of the fifth accounting they claimed as proper disbursements. (See *Estate of Jacobson* (1942) 56 Cal.App.2d 255, 261.) They simply have not met their burden of showing the probate court erred in setting the amount of disallowances. (*Denham v. Superior Court, supra*, 2 Cal.3d at p. 564.) Where the record is silent, as here, as to what specific items the probate court was using to arrive at the total amount of disallowed disbursements in a guardianship or

BEST AVAI

conservatorship account, we presume the court properly arrived at such amount. (See *Guardianship of Hall* (1947) 31 Cal.2d 157, 164.) Regardless, having thoroughly review the record, we find the compromised amount of disallowances of disbursements fully supported by the record and conclude the probate court did not abuse its discretion.

V

Attorney Fees

finally, the Waterses contend that the portion of the September 20, 1995 order awarding attorney fees in the amount of $9,660 to Abeles upon her oral motion at the August 9, 1995 hearing is invalid. They argue that because the court awarded the fees without written supporting evidence or a hearing on the propriety and amount of such that they were wrongly approved as a matter of law. The Waterses also repeat their emotional argument that they have so benefited Alicia's estate with their "enormous personal sacrifice in deciding to make a life for her at home rather than in an institution" to support their claim any fee to Alicia's court-appointed attorney was unwarranted because her appointment was unnecessary, her services have hindered rather than enhanced the guardianship/conservatorship estate, she merely duplicated work which was performed by Frazier and his counsel, and she has already been paid "interim fees" in the conservatorship proceeding. Based on such arguments the Waterses assert the probate court abused its discretion in awarding Abeles fees and the award must

ABLE COPY

be vacated. No abuse of discretion is shown.

As noted above, all parties were present for the lengthy nonreported chambers conference held August 9, 1995, before the court made its ruling which included the approval of attorney fees for Abeles. No objection by the Waterses to such award appears to have been made at that time. Nor does the record reflect any objection or request to reconsider such award by the Waterses until this appeal. Although Abeles's fee request was granted on an oral motion, the Waterses had notice of such request by the sheer fact their attorney and Mrs. Waters herself were present at the hearing. Clearly, under settled principles of appellate review, the Waterses cannot now complain about the matter of Abeles's attorney fees for the first time. (See *Estate of Cooper, supra*, 11 Cal.App.3d at p. 1123.)

VI

Sanctions on Appeal

the question remains whether sanctions on appeal should be awarded. Conceding the issue concerning the portion of the promissory note amount for $10,938.87 "unaccounted for" has merit, Frazier requests $24,437.32 sanctions be awarded on grounds the "significant and material part of the [Waterses'] appeal" is indisputably without merit and their action in filing the appeal frivolous. (*Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1010, italics omitted.) We deny the request for sanctions.

Although an appeal may be without

merit, such fact is not by definition frivolous and should not incur sanctions. (Code Civ. Proc., § 907.) Similarly, the power to punish parties or attorneys for prosecuting frivolous appeals should be used sparingly to deter only the most egregious conduct. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650; Cal. Rules of Court, rule 26(a).)

While our disposition for the most "significant and material part" is adverse to the Waterses, after reviewing the record in light of the parties' briefs and the pertinent law, we cannot say that no reasonable attorney would have advanced issues concerning the res judicata effect of the earlier approved accountings or have raised questions about the basis of the disallowance of certain expenditures. (*San Bernardino Community Hospital v. Meeks* (1986) 187 Cal.App.3d 457, 470.) Nor can we say that this appeal was motivated solely to harass Frazier or delay the effects of the court's September 20, 1995. We do not believe the Waterses appealed for any other reason than their subjective belief that they are rightfully entitled to spend whatever and however from Alicia's guardianship/conservatorship estate funds to provide for her comfort and dignity at home with her family. Thus, on balance, we decline to impose sanctions against the Waterses and their attorney.

DISPOSITION

The amount of $10,938.87 for sums unaccounted for in the September 20, 1995 order charged against the Waterses is stricken. As so modified, the order

appealed from is affirmed.
The motion for sanctions is denied. The Waterses to bear cost on appeal.

/S/ HUFFMAN, J.

WE CONCUR:

/S/ Benke, Acting P.J.

/S/ McDonald, J

Fourth Appellate District, Division One, No. D024562
S062616

IN THE SUPREME COURT OF CALIFORNIA

Conservatorship of the Person and Estate of ALICIA A. WATERS

CHARLES E. WATERS Et Al., Appellants

v.

PIERRE B. FRAZIER Et Al., Respondents

Petition for Review DENIED.

/s/ ORMES

Chief Justice